IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
August 5, 2009 Session

LYNETTE LINTON STRANGE v. CRAIG PIERREPONT STRANGE

Appeal from the Circuit Court for Knox County
No. 04-096108 Bill Swann, Judge

No. E2008-01841-COA-R3-CV - FILED FEBRUARY 2, 2010

This appeal involves a wife's effort to set aside or modify a final judgment of divorce after learning that the husband had concealed the receipt of pension benefits prior to wife signing the marital dissolution agreement. The trial court granted the wife's Rule 60 motion and the trial court awarded her attorney fees and interest. We affirm the judgment of the trial court.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed; Case Remanded

JOHN W. MCCLARTY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and D. MICHAEL SWINEY, J., joined.

Brent R. Watson and Suzanne N. Price, Knoxville, Tennessee, for Appellant, Craig Pierrepont Strange.

Lauren G. Strange-Boston, Knoxville, Tennessee, for Appellee, Lynette Linton Strange.

OPINION

I. BACKGROUND

Lynette Linton Strange ("Wife") filed a complaint for divorce on January 14, 2004. During that same month, Craig Pierrepont Strange ("Husband") turned 55 years old and retired from the Tennessee Valley Authority ("TVA"). Prior to Husband's retirement, he earned approximately $80,000 per year. The parties, married for 33 years, had one minor child, age 16, remaining in the marital home.

Wife, 54 years old at the time she filed for divorce, withdrew one-half, or approximately $16,000, from a joint bank account and deposited her half in a separate account. During the pendency of the divorce, Wife did not utilize any of the money. She vacated the marital residence and the minor child moved with her.

In August 2004, Wife's counsel served the first set of interrogatories and request for production of documents. The discovery request asked for specific information about income, cash assets, and retirement accounts. Husband responded on September 30, 2004.

The parties attended a trial management conference on November 15, 2004, at which time the issue of Husband's ability to begin drawing his pension benefit from TVA was brought before the trial court. Wife argued at that time that the trial court should enjoin Husband from drawing the TVA pension – a defined benefit plan – unless one-half of each payment received was given to her. She claimed that by drawing on the pension, Husband was violating the statutory injunctions addressed in Tenn. Code Ann. § 36-4-106(d) (2005). The trial court ruled that Husband would not violate the statutory injunctions by drawing on the pension and that he could begin receiving payments, but that the funds were marital property and would be subject to redistribution at trial.

On November 23, 2004, the parties appeared before the child support referee upon Wife's application for pendente lite child support. The referee found that the minor child resided exclusively with Wife and that Husband had paid no child support. She further determined that Husband was not working and was voluntarily underemployed. She concluded that Husband was eligible to draw $29,820 per year in pension benefits. The referee found, inter alia,

> As of October 31, 2004, Husband is in arrears on his child support obligation in the amount of $2,568, which he shall retire by adding $72 each month to his monthly payment of ongoing child support, making his total payment $500 each month. The amount of said arrearage is subject to retroactive adjustment upon the Court's determination of Husband's earning potential during the time he has owed child support.
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> * * *
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> Husband shall make a good faith effort to obtain employment that is as comparable to his previous employment as possible, and shall provide the Court with the completed form he received in court on which he shall provide all information on persons and businesses from whom he has sought employment.

* * *

Husband, however, did not immediately seek to receive the pension payments. On March 7, 2005, the parties appeared before the trial court for their final trial management conference. At the hearing, they stipulated to the existence and current values of various assets; indicated whether some of the assets were separate property, marital property, or if the character was in dispute; noted the final disposition of some assets; and listed their debts. The trial court ordered the parties to update the statements on all accounts. As of that day, the parties agreed that Husband had no funds in any of his bank or credit union accounts and that Wife had $16,405.70 in the account held only in her name. The next day, Husband finally applied for the TVA pension benefits.

On March 15, 2005, a second hearing was held before the child support referee. At that proceeding, Husband announced that he had formally applied for the pension benefits and would receive a payment on April 1, 2005. He advised that he expected the payment to be $2,485 per month and agreed to divide the payments evenly, including the April payment, with Wife. At the conclusion of the hearing, the referee again found that Husband would receive pension benefits in the amount of $29,820 per year, but that Husband had the ability to earn $3,500 per month. Additionally, the referee determined that Wife's income for child support purposes should be computed as $4,929.36 from her employment and $1,242.50 from her share of Husband's pension benefit beginning in March 2005, for a total monthly income of $6,171.86. The referee modified Husband's child support obligation to $598 per month, effective March 1, 2005. Husband was found to owe a child support arrearage of $3,280 through February 28, 2005. He was to retire the arrearage by paying $72 per month. His total monthly child support obligation was therefore $670. Both Husband and Wife and their counsel were all present during the hearing and approved the findings and recommendations of the referee with no objections.

On or immediately after March 15, 2005, Husband received a check from TVA in the amount of $39,600.64, which represented the total monthly pension benefits that Husband had postponed drawing from the time he became eligible to receive payments in January 2004 until he actually began receiving a regular monthly payment in April 2005. Husband neither informed Wife that he had received the lump sum payment nor did he amend his answers to the earlier discovery request.

On March 29, 2005, Husband's counsel sent a proposed marital dissolution agreement ("MDA") to Wife's counsel. Paragraph 6 of the MDA provides for Wife to receive one-half of Husband's pension payments from TVA ***beginning*** in April 2005:

Each of the parties shall have one-half of the Husband's interest in the TVA

> pension which is a defined benefit plan and a Qualified Domestic Relations Order shall issue dividing such pension such that the Wife receives one-half of the monthly benefit and the Husband receives one-half of the monthly benefit subject to the terms and conditions of the pension. Wife's counsel shall prepare the Qualified Domestic Relations Order. After the execution of this Agreement, the Husband shall pay to the Wife an amount equal to one-half of each pension payment he receives hereafter from said pension until the Qualified Domestic Relations Order becomes effective including the April, 2005 payment.

Interestingly, Paragraph 31 provides in pertinent part:

> **DISCLOSURE OF ASSETS**: Each party agrees that he or she has made a full disclosure of his or her assets and liabilities.

On April 4, 2005, Husband signed the MDA. Wife signed the agreement the next day. On April 6, 2005, a final judgment of divorce incorporating the MDA was entered into by the parties.

Four months later, Wife filed a petition for contempt in which she alleged problems with receiving child support payments and in obtaining the documents necessary to complete the Qualified Domestic Relations Orders (QDROs) to divide the 401(k) and the pension. Wife claimed that Husband had willfully failed to provide her the information that would allow her to verify the exact amount of her proper pension payment, in violation of paragraphs 6 and 26 of the MDA.[1]

In November 2005, upon reviewing documents obtained from TVA pursuant to a subpoena, Wife's counsel learned of the March lump sum payment. Subsequently, Wife filed a motion to set aside or modify the final judgment for divorce pursuant to Tenn. R. Civ. P. 60.02. In the motion, Wife alleged that Husband had fraudulently concealed his receipt of the lump sum payment, and that as a result of Husband's fraud, the final judgment should be set aside or modified to award her one-half of the $39,600.64, plus pre-judgment and post-judgment interest, attorney fees, expenses, and punitive damages. Wife contended that Husband had not updated his answers to the interrogatories and request for production of

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[1]Paragraph 26 of the MDA states as follows:

> Each party at the request of the other will execute and deliver all documents which may be reasonably necessary to give full effect to this agreement.

documents so as to not reveal his receipt of the lump sum payment. She further asserted that the MDA was specifically worded in an attempt to deny Wife the benefit of the lump sum payment.

Wife's Rule 60 motion was heard in June 2006. The trial court determined that the facts were undisputed and therefore denied Husband's request to put on proof regarding the relative economic positions of the parties at the time of the divorce. A month later, the trial court held as follows in a memorandum opinion:

> At an early stage in this case, this Judge noted that Craig Strange had no cash flow for the grocery store and the filling station, other than that which he was receiving through his TVA pension – early drawing down the same. This court held that accordingly drawing down the same was permitted under the statutory language of the statutory injunction.
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> That holding then has led to difficulty with which we are today presented. The Court wishes to address that difficulty, and in doing so, will make a distinction which may be an appropriate matter for appeal. And conceivably one side will wish to do that.
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> What this Judge said on 11/15/04 (unless a contrary court reporter's record can be promptly found) means that the husband might draw down the marital asset, to wit his pension, in monthly increments, and that the same was allowed under the statutory injunction, it being his only "income."
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> "Income" should only be understood as "cash flow"; further, as the Court further commented, or as the Court had indicated, such drawing down would be subject to redistribution of the same at trial. This Judge saw necessity for husband to, if you will, invade the marital asset to keep himself afloat, but that one-half of all the moneys which he took therefrom (or whatever percentage might emerge as appropriate under equitable distribution, and Counsel have subsequently settled upon half) would be made up at the final hearing or would be put into the balance and addressed under the principles of equitable distribution. The Court intended that each and every dollar drawn be recognized as a reduction of an asset which the Court held at that time was 100 percent [marital] property. The Court did not use the word "income" in any sense other than cash flow.
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> Now, this takes us to a most interesting point. And that is, if the cash stream from the marital asset pension – Counsel stipulated that the pension was

wholly earned during the marriage – if the cash stream from such a marital asset can be deemed pendente lite income of the recipient and not redistributed at trial, then what emerges is that the recipient is living off one-half of his marital property and one-half from her marital property.

If that is condoned, the word will go forth that there is a magnificent, standard, manipulative, and unfair tactic which can be utilized, pendente lite, to reduce marital property benefitting only the recipient. I think we can contemplate trials being delayed, so that the recipient of the marital pension in the meantime can live 100 percent from it.

The Court holds today that the $39,600 is 100 percent marital property; that that amount shall flow to the parties pursuant to the principles of equitable distribution. I believe that Counsel have taken the position that that should be one-half each. So it appears to me.

We find no fraud here. As there is a viable theory of law, to wit, this was "income" during the divorce. The viable theory of law emerges from this Court's own remarks touching upon the statutory injunction.

Let me be perfectly clear: The language of the Tennessee statutory injunction touching upon assets and insurance policies and so forth during the pendency of the divorce, the statutory injunction does not – its exclusion of current income does not work a reclassification of a cash flow from a marital asset, in order to make that an acceptable expenditure.

This then takes us to the suggested duty to update the interrogatory responses of September 30, 2004, pursuant to Tennessee Rules of Civil Procedure 26.05. There are four interrogatory questions posed to the husband, which wife says he had a duty to update, and had he done so, he would have disclosed the $39,600. The Court holds that these four interrogatory questions taken together are a more than adequate posing of questions to have discovered the $39,600.

One or more – or certainly all of them taken together – cannot, would not have failed to disclose the $39,600 had husband updated them. He did not do so. But it was a viable theory, as I say, that takes this case out of the fraud category. But this amount of money needed to be disclosed. Whatever husband's theory about it was, it had to have been disclosed.

> Accordingly, while we do not find that this [is] a fraud case, and we'll talk about Rule 60 in a moment, this is an appropriate case for attorney fees, incidental expenses if there are any, and any court costs applicable to this matter. It is not an appropriate case for punitive damages for the same reason this is not a fraud case.
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> Now, Counsel, touching upon Rule 60, it would seem that we do have a relatively small change here. We are – but in terms of the entire case, it's a re-papering of one room in the house, rather than the tearing down of the whole house, arguably. I don't believe this goes to the essence of the contract. . . .
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> THE COURT: . . . The Court has said this is 100[%] marital property, and it shall flow to the parties pursuant to the principles of equitable distribution. If that is not – if you don't think that is equitable, then we can have a reopening of the case as to the relative percentages of the [$]39,600 and how it should flow leaving the rest of the divorce intact. I believe that does less violence to the parties, and leaves the door completely open to you touching upon the [$]39.6. . . .
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> THE COURT: . . . [A]s noted, the husband shall depose the wife if he chooses and he wishes to do so in the next 30 days. And there in the 15 days following therefrom, he shall file a pleading requesting relief or the equitable distribution shall be [$]39,600, one-half to each.
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> * * *
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> The husband is not now, cannot then, have been entitled to rely upon keeping the [$]39,600 completely for himself. He should have disclosed it. He didn't disclose it. He was wrong in that. . . .

By an order dated August 11, 2006, the memorandum opinion became the final judgment of the trial court.

Husband subsequently filed a motion for new trial. He alleged that the trial court erred in refusing to allow him to offer testimony regarding the tax implications of the

withdrawal of funds from the pension and his financial condition on the date of the divorce. Husband also contended that the court erred in not setting aside the entire divorce so it could consider all of the parties' assets and debts in order to make the property division equitable rather than simply dividing the $39,600.64 evenly between the parties. Additionally, he argued that Tenn. Code Ann. § 36-4-129 required the court to divide the assets as of the date of the divorce. He further asserted that the court erred in awarding interest at the statutory percentage rate beginning 30 days after the entry of the judgment of divorce (May 6, 2005) since no final judgment on this matter was awarded to Wife until August 11, 2006; that the court erred in finding this an appropriate case for attorney fees, incidental expenses, and court costs; that the court erred in limiting the Husband to taking the Wife's deposition only as to things that were unknown and not as to the relative financial positions of the parties on the date of the divorce; and that the findings and order of the court were contrary to the weight of the evidence.

Hearings were held on January 12 and April 20, 2007, relative to the new trial motion and the issues of attorney fees and interest. Husband's motion was ultimately denied and the trial court awarded Wife attorney fees in the amount of $8,639.40. The court stated as follows in a memorandum opinion:

> The Court holds in this matter that touching upon the Rule 60 concerns brought to the Court's attention, that, in fact, the Court did have the authority to award attorney fees pursuant to Rule 60. The Rule 60 matter was in every way a continuation of the divorce case itself, an effectuation of the intent of the parties, which was subverted by the deception of the husband. The Rule 60 motion invokes the Court's power to address attorney fees.
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> Further, it is only equitable that that should be addressed since it is the husband's deception that caused this problem. The same remarks obtain as to the award of interest. The attorney fee before today, [$]8,559.40, which includes some expenses, is approved, plus an additional $80 for half the per diem today; we will not tack on any additional attorney fees for Ms. Strange-Boston's labors today. Now, that's the attorney fees for the Rule 60 matter.
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> We have attorney fees yet sought in the amount of some $5,000 for the contempt action that is – that was brought. I would indicate to you simply by way of dicta that some attorney fees do appear to lie, and we note that $5,000 is sought, and we'll set those attorney fees on a future day.
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> On that same future day we'll take argument on the amount of the interest, if any, that husband owes on the figure of [$]7,287.42, which is putatively the

> correct amount he yet owes. He will have one week, seven days, until 4/27/07, close of business to dispute that amount, and if he does not dispute it, he shall pay the same on that date.
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> * * *

In an order entered June 28, 2007, nunc pro tunc April 20, 2007, the trial court specifically provided:

> The Court hereby affirms its award to Wife of interest on the principal sum of $19,800.32 it awarded her as a result of her Motion to Set Aside or Modify Final Judgment for Divorce, said interest to begin accruing on May 6, 2005, which is 30 days after entry of the Final Judgment for Divorce;
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> The Court hereby affirms its award to Wife of the attorney fees and expenses she incurred in regard to the issues raised in her Motion to Set Aside or Modify Final Judgment for Divorce, and hereby awards her a judgment against Husband in the amount of EIGHT THOUSAND SIX HUNDRED THIRTY-NINE DOLLARS AND FORTY CENTS ($8,639.40) for same, which award constitutes a final judgment in that litigation;
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> * * *
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> If Husband disputes that he still owes Wife $7,287.42 for her portion of pension payments made to him before TVA began paying Wife's portion directly to her, he shall provide Wife with proof of same by the close of business on April 27, 2007. If he does not do so, he shall pay Wife that amount by the close of business on that date.

In July 2008, the trial court heard argument regarding "the amount of attorney fees to which Wife [was] entitled as a result of Husband's failure to comply with the provisions of the parties' Marital Dissolution Agreement as set forth in her Petition for Contempt." The trial court found as follows:

> 1. Since the hearing in this case, the parties agreed on the amount Husband owed Wife for her portion of pension payments he had not given her and the amount of interest owed thereon, all of which has been paid in full and to the parties' satisfaction.

2. Due to an error detected in her Affidavit and the billing statements submitted in support thereof, Wife agreed to reduce to $5,287.50 the sum she seeks in compensation for the attorney fees she incurred as a result of Husband's contempt; and

3. All of the attorney fees for which Wife seeks reimbursement could be attributed to Husband's failure to comply with the provisions of the Marital Dissolution Agreement, but Husband suggests that not all billings relate to such.

It is therefore ORDERED, ADJUDGED and DECREED as follows:

1. Defendant, Craig [Pierrepont] Strange, shall pay to Plaintiff, Lynette Linton, FOUR THOUSAND TWO HUNDRED EIGHTY-SEVEN DOLLARS AND FIFTY CENTS ($4,287.50) for attorney fees she incurred as a result of his failure to comply with the parties' Marital Dissolution Agreement, and she is hereby awarded a judgment against him in that amount.

2. This Order adjudicates all remaining claims pending in this case and all rights and liabilities of both parties to it, and therefore constitutes a final judgment in this case.

3. The costs of this cause are taxed to Craig Pierrepont Strange . . . .

This appeal ensued.

II. ISSUES

The issues presented by Husband are as follows:

A. Whether the trial court abused its discretion by granting Wife's Rule 60 motion and by ruling that the Rule 60 motion was a matter of law and therefore there was no necessity of proof or testimony beyond the argument of counsel.

B. Whether the trial court erred by awarding Wife one-half of Husband's $39,600.64 without hearing any proof as to whether this division of the property was equitable in light of the MDA and the circumstances of the parties at the time of the divorce.

C. Whether the trial court erred by granting Wife attorney fees on the basis of the Rule 60 motion.

D. Whether the trial court erred by awarding interest to Wife on the principal sum of $19,800.32 to begin accruing on May 6, 2005, as no judgment was awarded to Wife until August 11, 2006.

Wife requests attorney fees on appeal.

III. STANDARD OF REVIEW

We review a trial court's award of relief pursuant to Tenn. R. Civ. P. 60.02 under an abuse of discretion standard. *Federated Ins. Co. v. Lethcoe*, 18 S.W.3d 621, 624 (Tenn. 2000); *Underwood v. Zurich Ins. Co.*, 854 S.W.2d 94, 97 (Tenn. 1993). Unless the trial court abused its discretion, its ruling on a Rule 60.02 motion may not be reversed on appeal. *Id.* A trial court abuses its discretion only when it "applies an incorrect legal standard, or reaches a decision which is against logic or reasoning or that causes an injustice to the party complaining." *Eldridge v. Eldridge*, 42 S.W.3d 82, 85 (Tenn. 2001); *State v. Shirley*, 6 S.W.3d 243, 247 (Tenn. 1999).

Our review of the record is de novo with the presumption that the trial court's factual findings are correct. We will honor those findings unless the evidence preponderates against them. Tenn. R. App. P. 13(d); *Wright v. City of Knoxville*, 898 S.W.2d 177, 181 (Tenn. 1995). The presumption of correctness does not attach to the trial court's conclusions of law. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996).

IV. DISCUSSION

A.

Tenn. R. Civ. P. 60.02 provides in pertinent part as follows:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . . or (5) any other reason justifying relief from the operation of the judgment.

Tenn. R. Civ. P. 60.02. Relief under the rule is considered "an exceptional remedy." *Nails v. Aetna Ins. Co.*, 834 S.W.2d 275, 294 (Tenn. 1992). The rule's function is "to strike a proper balance between the competing principles of finality and justice." *Banks v. Dement Constr. Co., Inc.*, 817 S.W.2d 16, 18 (Tenn. 1991) (quoting *Jerkins v. McKinney*, 533 S.W.2d 275, 280 (Tenn. 1976)). This court has interpreted the power to "relieve a party . . . from a final judgment" to include the power to relieve a party from all or any part of a final judgment and to grant a rehearing of all or any part of the issues as justice may require. *Anderson v. Anderson*, No. 86-202-II, 1986 WL 14442, at *2 (Tenn. Ct. App. M.S., Dec. 24, 1986).

Husband contends that Rule 60 relief was inappropriate in this matter because the trial court found that he did not commit fraud. He further claims that the trial court abused its discretion by granting Rule 60 relief to Wife and awarding her one-half of the $39,600.64, as she failed to present any proof warranting such relief.

It appears the trial court granted Wife's Rule 60 motion pursuant to subsection (2) of Rule 60.02. That provision permits a court to award post-judgment relief on the basis of "fraud . . . , misrepresentation, or other misconduct of an adverse party . . . ." Tenn. R. Civ. P. 60.02(2). The trial court found Husband guilty of "misrepresentation" or "other misconduct." The court noted as follows:

> The Court holds that these four interrogatory questions taken together are a more than adequate posing of questions to have discovered the $39,600. One or more – or certainly all of them taken together – cannot, would not have failed to disclose the $39,600 had husband updated them. He did not do so. . . . **But this amount of money needed to be disclosed. Whatever husband's theory about it was, it had to have been disclosed.**
>
> **The husband is not now, cannot then, have been entitled to rely upon keeping the $39,600 completely for himself. He should have disclosed it. He didn't disclose it. He was wrong in that.**
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> * * *

(Emphasis added).

A party's obligation to amend his responses to interrogatories arises if he "knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment." Tenn. R. Civ. P. 26.05(2)(B). The trial court found that whatever Husband's theory was about the

$39,600.64, Tenn. R. Civ. P. 26.05 obligated him to amend his discovery responses to reveal his receipt of the money.

Tenn. R. Civ. P. 37.03 explains the consequences of failing to "supplement or amend responses to discovery requests as required by Rule 26.05," may, but need not necessarily include, the imposition of sanctions authorized under Tenn. R. Civ. P. 37.02 for failure to comply with an order. Tenn. R. Civ. P. 37.03(1). In *Mercer v Vanderbilt Univ., Inc.*, 134 S.W.3d 121 (Tenn. 2004), a case in which the trial court had excluded evidence due to Vanderbilt's failure to supplement its answers to interrogatories pursuant to Tenn. R. Civ. P. 26.05(1), the Tennessee Supreme Court noted:

> Trial courts have wide discretion to determine the appropriate sanction to be imposed. Such a discretionary decision will be set aside on appeal only when "the trial court has misconstrued or misapplied controlling legal principles or has acted inconsistently with the substantial weight of the evidence." Appellate courts should allow discretionary decisions to stand even though reasonable judicial minds can differ concerning their soundness.

Mercer, 134 S.W.3d at 133 (citations omitted).

"[T]he inherent power of trial judges permits the trial judge to take appropriate corrective action against a party for discovery abuse." *Lyle v. Exxon Corp.*, 746 S.W.2d 694, 699 (Tenn. 1988) (citing *Strickland v. Strickland*, 618 S.W.2d 496, 501 (Tenn. Ct. App. 1981)). "The trial courts of Tennessee must and do have the discretion to impose sanctions . . . in order to penalize those who fail to comply with the rules and, further, to deter others from flouting or disregarding discovery orders." *Holt v. Webster*, 638 S.W.2d 391, 394 (Tenn. Ct. App. 1982).

Husband further argues that as the party seeking relief, Wife had the burden of presenting clear and convincing evidence that she was entitled to relief. Husband asserts that the statements of Wife's counsel during the hearing are not evidence. *See In re Estate of Williams*, No. M2000-02434-COA-R3-CV, 2003 WL 1961805, at *14, n. 4 (Tenn. Ct. App. M.S., Oct. 6, 2003). He also contends that Wife's unsworn allegations in her Rule 60 motion do not constitute proof. *See State v. Draper*, 800 S.W.2d 489, 493 (Tenn. Crim. App. 1990). He argues, therefore, that Wife failed to carry her burden and that the trial court abused its discretion by granting her Rule 60 relief.

In his response to Wife's Rule 60 motion, Husband "admitted that the TVA records show that on March 15, 2005, a check was issued" to him "in the amount of $39,600.64 as payment for the monthly pension payments . . . ." Husband further "admits that he did not

formally update his responses" to Wife's discovery requests. These undisputed facts fully support a finding of misrepresentation and misconduct. There was no need for further proof.

Husband indicated on the MDA that he had fully disclosed all of his assets. He clearly misrepresented them. He mislead Wife into entering into an agreement that deprived her of an interest in a substantial marital asset.

Post-judgment relief is warranted when the moving party proves the existence of conduct amounting to "an intentional contrivance by a party to keep complainant and the court in ignorance of the real facts touching the matter in litigation, "whereby a wrong conclusion was reached, and positive wrong done to the complainant's rights." *Leeson v. Chernau*, 734 S.W.2d 634, 638 (Tenn. Ct. App. 1987). Because Husband failed to disclose the lump sum payment, Wife reasonably believed that the MDA paragraph reflected her entitlement to "one-half of Husband's interest in the TVA pension," meaning all payments Husband received from the pension, not "one-half of Husband's interest in the pension after he has kept the first $39,600.64 for himself." Wife lacked knowledge "of the truth as to the facts in question" and Husband denied her the opportunity to obtain that knowledge by ignoring his duty to supplement his responses to her discovery requests. *See generally Lyman v. James,* E2002-02859-COA-R3-CV, 2003 WL 23094419, at *6 (Tenn. Ct. App. E.S., Dec. 30, 2003). He did not disclose the receipt of the money because he knew she would not sign an MDA that did not include half of the money. Husband's counsel told the trial court:

> Well, if I had come to Ms. Strange-Boston, if I had had the liberty to do that, and said, "My client, when he drew his pension, they gave him retroactive payments back to January 1, and we consider those to be the income that he otherwise was entitled to based upon the Court's ruling that he had the right to draw that," should I believe that Ms. Strange-Boston will say, "Well, I agree with you. Just go ahead and keep those payments?"

We cannot conclude that the trial court abused its wide discretion in granting Wife's motion for relief under Tenn. R. Civ. P. 60.02.

B.

According to Husband, instead of equitably dividing the $39,600.64, the trial court inequitably awarded Wife one-half of his monthly "income" from the date the Wife filed for divorce until March 2005, and allowed Wife to keep all of her monthly income earned during those same months. Husband's counsel notes that he requested multiple times that the trial

court grant Husband a hearing as to the relative economic positions of the parties at the time of the divorce. Husband contends the proof would have shown that Wife had substantially more income than Husband during the time period in question. He argues that at the time Wife filed her divorce complaint, she was employed earning approximately $60,000 per year. According to Husband, Wife therefore had $4,929.36 per month available to her plus $16,000 from the joint savings account. He contends that to pay his monthly living expenses and debts during the months of January 2004 until March 2005, he had only the money from the joint bank account and the ability to access the money from his pension account. Once Husband received the $39,600.64, he claims that he used the money to pay off bills he had accumulated, including delinquent mortgage payments and back taxes, and to restore the money from the savings account which he had used and in which Wife still had an interest. He further notes that he was required to pay taxes on the pension funds and therefore did not receive the full $39,600.64.

In a divorce case, the trial court is required to divide the parties marital property equitably – without regard to fault – pursuant to the factors listed in Tenn. Code Ann. § 36-4-121. The trial court is under no obligation to divide the marital property equally, but rather equitably, for "[t]he division of the estate is not rendered inequitable simply because it is not mathematically equal or because each party did not receive a share of every item of marital property." *King v. King*, 986 S.W.2d 216, 219 (Tenn. Ct. App. 1998) (citations omitted). The trial court has "wide discretion in adjusting and adjudicating the parties' rights and interests in all jointly owned property." *Fisher v. Fisher*, 648 S.W.2d 244, 246 (Tenn. 1983). Thus, "a trial court's division of the marital estate is entitled to great weight on appeal and should be presumed to be proper unless the evidence preponderates otherwise." *Batson v. Batson*, 769 S.W.2d 849, 859 (Tenn. Ct. App. 1988) (citations omitted).

Husband argues that the applicable statute required the trial court to either set aside the entire MDA, conduct a hearing to learn the parties' relative economic positions at the time of the divorce and fashion a division of all their marital property, or to have the hearing on the parties' relative economic positions before deciding how to divide just that sum. Thus, according to Husband, the parties "need to go back and do discovery and find out what the wife's financial position was at the time of the divorce, and go back and have an equitable distribution of these funds based upon [Husband's] lack of funds at the time of the settlement." Counsel for Husband asserted that Husband should be awarded all of the $39,600.64 under the principles of equitable distribution as a result of the relative economic positions of the parties at the time of the divorce.

The trial court found that hearing testimony about the parties' relative financial positions at the time of the divorce was unnecessary. The court stated that the $39,600 was 100 percent marital property and determined that it should flow to the parties pursuant to the

principles of equitable distribution. The court found that the distribution on which counsel had settled and reflected in the MDA was equitable. Thus, the court divided the $39,600.64 evenly.

We find that all the contentions of Husband lack merit. Husband had been told by the court that the funds were marital, had not been awarded to him, and were subject to redistribution at trial. If he disposed of them, he did so at his own risk. How Husband used the funds was not relevant. The evidence properly before this court does not preponderate against the findings of the trial court.

C.

Husband argues that Tenn. R. Civ. P. 60 contains no provision for the award of attorney fees. Wife avers she is "entitled to the benefit of all sanctions available under the law" for Husband's "willful and intentional failure to reveal the $39,600.64 in lump sum pension benefits TVA paid him on March 15, 2005."

Although the trial court held there was no fraud, it found that Husband's conduct in failing to disclose his receipt of the lump sum pension payment was wrong, deceptive, and a violation of his obligation under Tenn. R. Civ. P. 26.05 to update his responses to Wife's discovery requests. Accordingly, the trial court levied sanctions that properly included attorney fees and litigation expenses, which was a proper exercise of its discretion. *Castelli v. Castelli*, No. E2004-02997-COA-R3-CV, 2006 WL 1152613, at *4 (Tenn. Ct. App. E.S., May 1, 2006) ("The award to the wife of her attorney's fees incurred in uncovering the concealment was a proper way to sanction the husband for his wrongful conduct . . . .").

Additionally, Paragraph 27 of the MDA provides in pertinent part:

> **Non-Compliance**: Should either party incur any expense or legal fees as a result of the breach of any portion of this Marital Dissolution Agreement by the other party, the Court shall award reasonable attorney's fees and suit expenses to the non-defaulting party . . . .

Because Wife had to incur expenses and legal fees in order to effectuate the parties' intent as set forth in their MDA, the husband's conduct can fairly be deemed a breach that entitles Wife to the attorney fees and suit expenses.

Under either theory, the trial court properly exercised its discretion in awarding Wife the attorney fees and expenses she incurred as a result of Husband's actions. A trial court's

decision to impose sanctions for discovery abuses is discretionary. *See Mansfield v. Mansfield*, No. 01A019412CH0058, 1995 WL 643329, at *5 (Tenn. Ct. App. M.S., Nov. 3, 1995). "On appeal, the exercise of discretion by a trial court in imposing sanctions will not be disturbed in the absence of an affirmative showing of abuse." *Brooks v. United Uniform Co.*, 682 S.W.2d 913, 915 (Tenn. 1984). There is no such showing of abuse in this case.

D.

Wife prayed in her Rule 60 motion for "an equitable portion, and at least 50% of the $39,600.64 in pension benefits Husband received just prior to the entry of the Final Judgment in this case, plus pre-judgment and post-judgment interest." The trial court awarded interest on the principal sum of $19,800.32 – one-half of the lump sum pension payment – with the interest to begin accruing on May 6, 2005, 30 days after entry of the final judgment of divorce. Husband argues that "[the] trial court had no authority to award the Appellee interest on the judgment amount before June 23, 2006 [the date it awarded her half of the $39,600.64]." He cites to Tenn. Code Ann. § 47-14-122, the statutory provision addressing post-judgment interest.

The trial court clearly had the authority to award Wife pre-judgment interest pursuant to Tenn. Code Ann. § 47-14-123, which states in pertinent part:

> Prejudgment interest. – Prejudgment interest, i.e., interest as an element of, or in the nature of, damages, as permitted by the statutory and common laws of the state as of April 1, 1979, may be awarded by courts or juries in accordance with the principles of equity at any rate not in excess of a maximum effective rate of ten percent (10%) per annum . . . .

Tenn. Code Ann. § 47-14-123 (2001).

"The allowance of prejudgment interest, like attorney's fees, is discretionary with the trial court," *Mitchell v. Mitchell*, 876 S.W.2d 830, 832 (Tenn. 1994) (citing *Uhlhorn v. Keltner*, 723 S.W.2d 131, 138 (Tenn. Ct. App. 1986)). "The usual means of compensating for [loss of use of funds] is the allowance of interest. Interest recovered in order to make the obligee whole is the relief usually sought, and the allowance of prejudgment interest under such circumstances is 'familiar and almost commonplace.'" *Id.* (citing *Deas v. Deas*, 774 S.W.2d 167, 170 (Tenn. 1989)). "Where, as in this case, the amount of the obligation is certain, or can be ascertained by a proper accounting, and the obligation is not disputed on reasonable grounds, the Court may allow prejudgment interest in accordance with principles of equity." *Id.* (citing *Uhlhorn*, 723 S.W.2d at 138; *Textile Workers Union of Am., Local No.*

513 v. Brookside Mills, Inc., 326 S.W.2d 671, 675 (Tenn. 1959) (*overruled by Myint v. Allstate Ins. Co.*, 970 S.W.2d 920, 928 n. 7 (Tenn. 1998) where the Tennessee Supreme Court held "To the extent these cases suggest that prejudgment interest can never be awarded when a claim is reasonably disputed, regardless of any equitable considerations, they are hereby overruled").

The trial court clearly found that Wife was entitled to an equitable portion of the pension funds and that she should be compensated at the rate of 10 percent for her loss of their use for all but 30 days since entry of the final judgment for divorce. That decision was wholly within the trial court's discretion, *see* Tenn. Code Ann. § 47-14-123, and "should only be reversed upon a showing of abuse of [that] discretion." *Raulston v. Raulston*, No. E2005-02463-COA-R3-CV, 2006 WL 2737996, at *3 (Tenn. Ct. App. E.S., Sept. 26, 2006) (citing *Otis v. Cambridge Mut. Fire Ins. Co.*, 850 S.W.2d 439, 446 (Tenn. 1992)). We find the award was a proper exercise of the trial court's discretion.

E.

Wife requests that this court award her attorney fees and expenses she has incurred in this appeal. We are authorized to do so pursuant to Tenn. Code Ann. § 27-1-122:

> When it appears to any reviewing court that the appeal from any court of record was frivolous or taken solely for delay, the court may, either upon motion of a party or of its own motion, award just damages against the appellant, which may include but need not be limited to, costs, interest on the judgment, and expenses incurred by the appellee as a result of the appeal.

Tenn. Code Ann. § 27-1-122 (2000). This court has described a frivolous appeal as one that is "'devoid of merit,' . . . or one in which there is little prospect that it can ever succeed." *Industrial Dev. Bd. of the City of Tullahoma v. Hancock*, 901 S.W.2d 382, 385 (Tenn. Ct. App. 1995) (quoting *Combustion Eng'g, Inc. v. Kennedy*, 562 S.W.2d 202, 205 (Tenn. 1978)).

Husband has not denied that he willfully failed to disclose his receipt of the marital pension funds shortly before the scheduled divorce trial. He admitted that he did not amend his responses to Wife's discovery requests to reveal his receipt of that asset. In arguing that there was no evidence properly before the trial court on which it could grant Wife's Rule 60 motion, Husband ignores that his admissions constitute stipulations that cannot be ignored.

In our view, the present appeal is groundless and devoid of merit. Wife "should not

have to bear the expense and vexation" of Husband's frivolous appeal. *See Whalum v. Marshall*, 224 S.W.3d 169, 181 (Tenn. Ct. App. 2006) (quoting *Davis v. Gulf Ins. Group*, 546 S.W.2d 583, 586 (Tenn. 1977)). Accordingly, we award attorney fees and expenses that Wife incurred in defending this appeal.

V. CONCLUSION

The trial court's grant of the Rule 60.02 motion, its award of one half of the lump sum pension benefit to Wife, and the award of attorney fees and interest to Wife, are affirmed. We hereby award reasonable attorney fees incurred on appeal to Wife and remand the matter to the trial court for a determination of the appropriate amount. Costs of the appeal are assessed against Appellant, Craig Pierrepont Strange.

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JOHN W. McCLARTY, JUDGE